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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1083

MONIQUE PREUX,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
and JOHN L. TODD, DISTRICT DIRECTOR,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR CERTIORARI

LOA E. BLISS
JAMES R. BARASH
Pikes Peak Legal Services
104 South Tejon
Suite 300
Colorado Springs, Colorado
80902
Telephone: (303)471-0380

Attorneys for Petitioner

TABLE OF CONTENTS

		Page
1.	Opinions Below	1
2.	Jurisdiction	2
3.	Question Presented	3
4.	Statutes and Constitutional Provisions Involved.	3
5.	Statement of the Case.	4
6.	Argument	6
	A. Section 241(f) is a remedial statute and should be construed liberally. . . .	6
	B. The deportation charge is not controlling in determining the applicability of Section 241(f).	9
	C. A liberal interpretation of Section 241(f) is not inconsistent with other provisions of the Act and does not create enforcement problems	13
7.	Conclusion	14
Appendix A	Opinion of the Tenth Circuit.	16
Appendix B	Decision of Court of Immigration Appeals. .	20
Appendix C	Decision of Special Inquiry Officer. . . .	22

		Page
Appendix D	Statutes.	32
Appendix E	Original Order to Show Cause.	36
Appendix F	Letter dropping deportation proceedings . .	38
Appendix G	Order to Show Cause .	39
Appendix H	Cabuco-Flores v. INS	41
Appendix I	Milande v. Immigration & Naturalization Service.	49

CITATIONS

CONSTITUTIONAL PROVISIONS:

Article I, Section 8, Clause 4 . . 6

STATUTES:

The Immigration and Nationality Act of 1952, 66 Stat. 163 ff., as amended:

§ 101(a)(3), 8 USC 1101(a)(3) . 3

§ 101(a)(15)(B), 8 USC 1101(a)(15)(B) 3

§ 103, 8 USC 1103 6

§ 105(a)(2), 8 USC 1105(a)(2) . 6

§ 212(a)(19), 8 USC 1182(a)(19) 3, 4, 7, 9

Page

§ 212(a)(20), 8 USC 1182(a)(20) 3

§ 221(a)(2), 8 USC 1201(a)(2) . 3

§ 241(a)(1), 8 USC 1251(a)(1) . 3, 4, 9

§ 241(a)(2), 8 USC 1251(a)(2) . 3

§ 241(f), 8 USC 1251(f) 3, 5-14

§ 242(b), 8 USC 1252(b) 3, 6

28 USC 1254(1) 2

CASES:

Cabuco-Flores v. INS,
Docket No. 72-1333
(9th Cir. 1973) 11

Ferrante v. INS,
399 F.2d 98
(6th Cir. 1968) 10

INS v. Errico,
385 U.S. 214,
87 S.Ct. 473,
17 L.Ed.2d 318 (1966) 7, 10-14

Lee Fook Chuey v. INS,
439 F.2d 244
(9th Cir. 1970)
r'hg den. 2-11-71 . . . . . 13, 14

Milande v. INS,
Docket No. 72-1529
(7th Cir. 1973) 10, 12

Page

Muslemi v. INS,
408 F.2d 1196
(9th Cir. 1969) 9

Ntovas v. Ahrens,
276 F.2d 483
(7th Cir. 1960)
cert. denied 364 U.S. 826 . . . 10

Tsaconas v. Immigration &
Naturalization Service,
397 F.2d 946
(7th Cir. 1968) 10

Vitales v. Immigration &
Naturalization Service,
443 F.2d 343
(9th Cir. 1971) 11

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR CERTIORARI

The Petitioner, by and through her attorneys, Loa E. Bliss and James R. Barash, Pikes Peak Legal Services, pray that this Court issue a Writ of Certiorari to review an Order entered against Petitioner by the United States Court of Appeals for the Tenth Circuit.

1. Opinions Below

The Order and Opinion of the United States Court of Appeals for the Tenth Circuit,

filed September 7, 1973, has not been officially published to date. It has been marked for publication (Appendix A, infra, p. 16).

The opinion of the United States Department of Justice Board of Immigration Appeals, now known as the Court of Immigration Appeals, was decided and filed on January 22, 1973, attached hereto (Appendix B, infra, p. 20), and is not officially reported.

The decision of the Special Inquiry Officer of the United States Department of Justice, Immigration and Naturalization Service, was entered and filed on October 30, 1972, and attached hereto (Appendix C, infra, p. 22). It is not officially reported.

2. Jurisdiction

Jurisdiction of this Court is sought pursuant to 28 U.S.C. 1254(1) to review a decision of the United States Court of Appeals for the Tenth Circuit entered September 7, 1973. Stay of Mandate was entered September term, on October 5, 1973, to and including October 31, 1973, and an extension of Stay of Mandate was subsequently granted to and including November 14, 1973. If on or before that date the Clerk of the Court of Appeals for the Tenth Circuit should receive a notice from the Clerk of the Supreme Court of the United States that a timely petition for Writ of Certiorari has been filed in the Supreme Court, then the Stay of Mandate will continue until final disposition by the Supreme Court.

No order requesting a rehearing and no order granting an extension of time in which to file a petition for certiorari has

been entered by the Court below.

3. Question Presented

The question presented is whether Section 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), applies to aliens admitted on immigrant visas only or whether it also applies to aliens who have entered on visitors visas and overstayed their time.

4. Statutes and Constitutional Provisions

The following statutory provisions involved herein are set forth in Appendix D, infra, p. 32).

	Immigration and Nationality Act of 1952
8 USC 1101(a)(3)	§ 101(a)(3)
8 USC 1101(a)(15)(B)	§ 101(a)(15)(B)
8 USC 1182(a)(19)(20)	§ 212(a)(19)(20)
8 USC 1201(a)(2)	§ 221(a)(2)
8 USC 1251(a)(1)	§ 241(a)(1)
8 USC 1251(a)(2)	§ 241(a)(2)
8 USC 1251(f)	§ 241(f)

The controlling statute, cited in recent Circuit Court opinions, is 8 U.S.C. 1251(f), Immigration and Nationality Act of 1952, § 241(f).

> "(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry

into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence."

5. Statement of the Case

The essential facts are not in dispute. The Petitioner is a Belgian National currently present in the United States. Petitioner gave birth to a child in Colorado Springs, Colorado, on September 5, 1970, and said child, Amorette Teresa Ortiz, is a citizen of the United States and Petitioner is the mother of said child. After the birth of the child, Petitioner left the United States with her and then re-entered the United States with her on June 25, 1971, with a nonimmigrant visitor's visa, which visa expired on December 24, 1972.

Deportation proceedings were first opened against Petitioner on October 27, 1971, long before the expiration of Petitioner's visitor's visa, by an Order to Show Cause (Appendix E, infra, p. 36) based upon Petitioner's alleged entry into the United States for the purpose of living permanently with a man in Colorado Springs, Colorado. Petitioner was alleged to be an alien excludable at the time of entry under 241(a)(1), 8 U.S.C. 1251(a)(1), as an immigrant not in possession of a valid immigrant visa, thus falling under the exclusionary provisions of Section 212(a)(19), 8 U.S.C. 1182(a)(19) (Appendix E, infra, p. 36). That proceeding was found to have been dropped erroneously by the District Director in a decision rendered

by the Special Inquiry Officer and available to the United States Court of Appeals for the Tenth Circuit on review. (Appendix C, infra, p. 22.) Had those proceedings been allowed to continue, a defense under Immigration and Nationality Act of 1952, § 241(f), 8 U.S.C. 1251(f), would have been directly related to the charge involved.

Petitioner did not leave the United States on December 24, 1971. On April 13, 1972, deportation proceedings were initiated against Petitioner on the grounds that she had overstayed her temporary visitor's visa which resulted in a finding by the Special Inquiry Officer that Petitioner was deportable and not entitled to relief under § 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), ruling that § 241(f) applies only to aliens who have obtained immigrant visas by fraud. Petitioner did, however, during the course of the hearing, attempt to demonstrate that under § 241(f) of the Immigration and Nationality Act, 8 U.S.C. 1251(f), she was saved from deportation because she had procured her nonimmigrant visa by fraud, she was "otherwise admissible at the time of entry," and she possessed the familial relationship required by the statute. On January 22, 1973, the Board of Immigration Appeals dismissed Petitioner's appeal and ordered her deportation.

The record of the earlier deportation action was received into evidence in the instant action. The decision of the Court of Immigration Appeals was subsequently appealed to the United States Court of Appeals for the Tenth Circuit, automatically staying Petitioner's deportation.

The Court of the first instance in the case at bar was the Special Inquiry Officer of the Immigration and Naturalization Service, whose jurisdiction rests on Article I, Section 8, Clause 4, of the United States Constitution, which gives Congress authority to establish a uniform rule of naturalization. Statutorily, such jurisdiction rests on Title 8 U.S.C. Section 1252 which specifically grants jurisdiction in such cases to a Special Inquiry Officer. The Court of Immigration Appeals obtained its jurisdiction by virtue of Title 8 C.F.R. Section 3.1 pursuant to Title 8 U.S.C. Section 1103. The jurisdiction of the United States Court of Appeals rests on Title 8 U.S.C. Section 1105(a)(2).

6. Argument

Petitioner submits that the United States Court of Appeals for the Tenth Circuit, in affirming the Court of Immigration Appeals, has rendered a decision in conflict with a prior applicable decision of this Court interpreting Title 8 U.S.C. 1251(f), Immigration and Nationality Act of 1952 Section 241(f) (Appendix C, infra, p. 22).

Petitioner further submits that if the decision of the Circuit Court is not in conflict with the prior applicable decision, it is because the prior applicable case did not decide directly on the same facts the question in issue, and that the scope of a Congressional act is in question and should be decided by this Court.

A. Section 241(f) is a remedial statute and should be construed liberally.

The government urges a narrow reading

of Section 241(f) which would limit the scope of its application solely to those aliens entering the United States with a fraudulently procured immigrant visa. However, a narrow construction of the statute is completely contrary to the tenor of this Court's decision in Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966). There this Court held that a literal application of the statute would strip it of practically all meaning, and thus contravene its broad humanitarian purpose of preventing the separation of family members. The Court placed considerable stress upon the remedial nature of the statute and emphasized that if any doubt exists as to its proper construction, such doubt should be resolved in favor of the alien. And the Court stated that,

> "... the administrative authorities have consistently held that Section 241(f) waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought, provided that the alien was 'otherwise admissible at the time of entry'" (385 U.S. at 217).

Literally, 8 U.S.C. 1251(f) applies only when an alien is charged with entering in violation of 8 U.S.C. 1182(a)(19), which excludes from entry "any alien who *** has procured a visa or other documentation *** by fraud, or by willfully misrepresenting a material fact ***." In Immigration and Naturalization Service v. Errico, 385 U.S. 214, 217, the Court rejected such a literal reading of 8 U.S.C. 1251(f). In Errico,

supra, the Court held that Section 1251(f) waived deportation of two aliens who had fraudulently procured immigrant visas. One had misrepresented his occupational eligibility for first preference quota status; the other had entered into a fraudulent marriage in order to obtain nonquota status as the spouse of an American citizen. The Immigration and Naturalization service brought deportation charges against the former on the ground that he was excludable at the time of entry as not of the proper status under the quota specified in the immigrant visa, and against the latter on the ground that she was not a nonquota immigrant as specified in her visa. The Court expanded the interpretation of Section 241(f) for the benefit of the aliens in holding that fraud in concealing or misstating a material fact in gaining immigrant visas to avoid quota restrictions did not destroy the alien's status as being otherwise admissible, and that therefore it did not matter that the quotas for the aliens' countries were over-subscribed at the time of their entry.

No support can be found in the express language of Section 241(f) for the government's contention that the benefits of this statute should be limited to aliens who have been admitted with fraudulently procured immigrant visas. Congress used the broadest possible language in the statute encompassing "aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation." Congress did not qualify the word "visas" with the word "immigrant," nor did it specify any particular type of "documentation," nor did it define "alien" as immigrant alien, nor for that matter, did it require

an alien to have sought to procure or have procured any visa or other documentation by fraud or misrepresentation. All that is required by the terms of the statute is that an alien has sought to procure or has procured "entry" into the United States by fraud. The language of the statute clearly indicates that Congress was not concerned with the manner in which an alien entered the United States. Rather, Congress was concerned with excusing all fraudulent entries provided the alien has the requisite familial relationship and is not excludable from the United States on any of the qualitative grounds enumerated in Section 212 of the Immigration and Nationality Act, 8 U.S.C. 1182.

B. The deportation charge is not controlling in determining the applicability of Section 241(f).

The government places reliance upon the deportation charge as being determinative of an alien's eligibility for a waiver of deportability under Section 241(f). It is contended that the statute does not apply to the Petitioner because the government did not charge her with deportability under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1), as an alien who has committed fraud in seeking entry or in procuring entry documents within the ambit of Section 212(a)(19) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(19). The Petitioner is, of course, amenable to deportation under Section 241(a)(1) as an alien who falls within the exclusionary provisions of Section 212(a)(19). Under identical circumstances, the alien was charged with deportability under Section 241(a)(1) in Muslemi v. Immigration and

Naturalization Service, 408 F.2d 1196 (9th Cir. 1969). See, Milande v. Immigration and Naturalization Service, Docket No. 72-1529 (7th Cir. 1973). (Appendix I, infra, p. 49.)

In effect, the government says that it may make the determination of who is to receive benefits under the statute simply by its selection of the deportation charge, regardless of the operative facts of the case. One who is deserving in the eyes of the government could be charged with fraud in obtaining entry in order to qualify for the benefits of the statute, whereas the supposedly undeserving alien could be charged with overstaying as the Petitioner was. As authority for this proposition, the government will rely on Ntovas v. Ahrens, 276 F.2d 483 (7th Cir. 1960), certiorari denied, 364 U.S. 826. However, that case was decided prior to this Court's decision in Errico which rejected a formalistic approach to the interpretation of Section 241(f). None of the principles laid down by this Court in Errico were considered in Ntovas.

The government will also rely upon two cases decided subsequent to this Court's decision in Errico, both of which involved aliens whose deportation was ordered on the charge of overstaying their authorized period of temporary admission. Ferrante v. Immigration and Naturalization Service, 399 F.2d 98 (6th Cir. 1968); Tsaconas v. Immigration and Naturalization Service, 397 F.2d 946 (7th Cir. 1968). In both of these cases, the aliens sought to invoke Section 241(f). However, they were unsuccessful in both instances because there was no evidence that they had gained entry by fraud or misrepresentation.

In Vitales v. Immigration and Naturalization Service, 443 F.2d 343 (9th Cir. 1971), for which certiorari was granted by this Court, the Ninth Circuit held that Section 241(f) relief was available to aliens in possession of a nonimmigrant visa. The subsequent Ninth Circuit decision, Cabuco-Flores v. Immigration and Naturalization Service, Docket No. 72-1333 (9th Cir. 1973) (Appendix H, infra, p. 41), did not technically reverse Vitales, but did reverse the position expressed therein inasmuch as Vitales had become moot by the alien's removal to the Philippines before the Court decided the issue. Cabuco-Flores, supra, sustained deportation on the ground that,

> "... the charge of remaining after the expiration of the period permitted by each petitioner's visa was not waived by Section 241(f) because it did not depend directly or indirectly upon the asserted misrepresentation in obtaining the visas." ___ F.2d at ___.

The government in effect argues that Petitioner is deportable because she has overstayed her visitor's visa and she does not have a valid immigrant visa.

The aliens in Errico did not have valid immigrant visas. Their immigrant visas were not properly issued, and they were not eligible immigrants under the provisions of the Immigration and Nationality Act. A fraudulently procured immigrant visa is equivalent to no visa. It makes little sense to argue that an alien with an invalid visa (no visa) should somehow be preferred to an alien without any visa. Hence, there is no rational

basis for giving preferential treatment to the alien who is admitted with a fraudulently procured immigrant visa. An alien who overstayed his time on a visitor's visa is in effect being charged with failure to have an immigrant visa. Petitioner in this case was specifically so charged (Appendix E, infra, p. 36). That charge was later dropped (Appendix F, infra, p. 38) in favor of a charge of simple overstay.

The Seventh Circuit decision, Milande v. Immigration and Naturalization Service, supra, held open the issue of whether or not the defense of fraud in the entry would be available as an affirmative defense to nonimmigrants when the charge is brought on grounds of fraud rather than grounds of overstay. It stretches credulity to envision a charge of fraud in the entry being made with respect to a nonimmigrant when it has been decided in a number of circuits that a charge of overstay will accomplish certain deportation. Thus even though the question technically is still open to adjudication it as a practical matter would seem to be foreclosed. The real issue then is the status of the alien as immigrant or non-immigrant and not the charge brought.

The Court below found that Petitioner had a concealed intent to remain and that this concealed intent to remain did not give rise to a deportation charge that "results directly from the misrepresentation." Immigration Service v. Errico, supra, at 217. There is, however, on the facts of the case, little if no difference in Petitioner's position and that of one of the aliens in Errico.

> "The issue is whether the statute saves from deportation an alien

> who misrepresents his status for the purpose of evading quota restrictions, if he has the necessary familial relationship to a United States citizen or a lawful permanent resident." Immigration Service v. Errico, supra, at 215 [Emphasis added].

Petitioner Scott, in Errico, entered into a sham marriage for the purpose of obtaining non-quota status. She had never lived with her husband and never intended to do so. Her concealed intent was to remain separate and apart from her sham spouse. In fact all species of fraud of necessity must involve some concealed intent. Petitioner Scott was charged with obtaining entry documents by fraud and therefore failure to have a valid immigrant visa. The position of the Petitioner Scott and Petitioner Preux is essentially the same. The practical effects of excluding nonimmigrants from protection is to circumvent the humanitarian purpose of the statute.

C. A liberal interpretation of Section 241(f) is not inconsistent with other provisions of the Act and does not create enforcement problems.

The government will urge that petitioner's interpretation of Section 241(f) conflicts with other provisions of the Immigration and Nationality Act and would create problems of enforcement of the immigration laws by allowing aliens to bypass a screening process. Both of these arguments were advanced in the government's petition for rehearing and suggestion for rehearing in Lee Fook Chuey v. Immigration and Naturalization Service, 439 F.2d 244 (9th Cir. 1971). In its order denying the government's

position, the Court found that the various sections of the Immigration and Nationality Act cited by the government did not evidence a statutory scheme pointing toward the limitation of Section 241(f) relief only to those who submitted themselves to the immigrant visa issuing procedure.

As the Court observed in Lee Fook Chuey, supra:

> "Almost invariably, by the time that the relief provision of 241(f) is invoked, the integrity of the immigrant visa system has been long violated. Section 241(f) deals with the problem after the breach has occurred. When Congress enacted this provision, it was reconciling strong and conflicting policies. Congress was dealing with problems arising from violations of the visa system, and had to do so in the context of ongoing family ties and expectations which had developed for many years after the breach. Without placing blame, we believe Section 241(f) as we have interpreted it, is the result of the ineffective enforcement of the Immigration laws, not the cause of it. (439 F.2d at 250).

7. Conclusion

Because of the humanitarian purpose of Section 241(f), and because the language of that statute is couched in the broadest possible terms, a fair reading of Errico, supra, would mandate according Petitioner relief under that section.

If in fact this Court believes that the recent Circuit opinions are in conformity with the Errico decision, then Petitioner would urge this Court to reconsider the intended scope of the statute in light of the particular facts presented by this case.

Respectfully submitted,

LOA E. BLISS
JAMES R. BARASH
Pikes Peak Legal Services
104 South Tejon
Suite 300
Colorado Springs, Colorado
80902
Telephone: (303)471-0380

Attorneys for Petitioner

APPENDIX A:

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

TERM -- 1973

MONIQUE PREUX, Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE, and JOHN L. TODD, District Director, Respondents.

No. 73-1083

Petition for Review of an Order of the Immigration and Naturalization Service

---

James R. Barash (Loa E. Bliss, on the brief), for Petitioner.

Bruce R. Heurlin, Attorney, Department of Justice (John L. Murphy, Chief, Government Regulations Section, Criminal Division, on the brief), for Respondents.

Before BREITENSTEIN, McWILLIAMS and BARRETT, Circuit Judges.

McWILLIAMS, Circuit Judge.

Monique Preux, a Belgian national, has filed in this court pursuant to 8 U.S.C.

§ 1105(a) a petition to review an order of the Immigration and Naturalization Service that she be deported. In our view the order of deportation is proper and should be affirmed.

Preux first entered the United States on a visitor's visa on November 28, 1969, and while in the United States gave birth to a child. Preux thereafter returned with the child to Belgium and later reentered the United States with the child on June 25, 1971, on a six months nonimmigrant visitor's visa. Accordingly, the visitor's visa expired on December 24, 1971. Preux, however, did not then leave the country and has thereafter at all times resisted efforts to deport her.

After deportation proceedings, an order was entered that she be deported pursuant to the provisions of 8 U.S.C. § 1251(a)(2). The precise grounds for deportation, and this we deem to be of importance, was simply that she had overstayed the time limitation in her visitor's visa and was accordingly no longer lawfully within the United States.

Preux concedes that she has overstayed her visitor's visa, but asserts that because of the ameliorative provisions of 8 U.S.C. § 1251(f) she cannot be deported. Accordingly, 8 U.S.C. § 1251(f) is at the heart of the present controversy. That statute reads as follows:

> "The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to

> procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen * * *."

It is Preux's theory of the case that she obtained her six months visitor's visa as the result of fraud and misrepresentation, the fraud and misrepresentation being that when she obtained the six months visitor's visa she had a concealed intent not to leave at the end of six months and, on the contrary, intended to stay permanently in the United States, and that had she revealed her true intent in this regard she would have been denied a visitor's visa. Such, according to Preux, brings into play the humanitarian provisions of 8 U.S.C. § 1251 (f) and precludes her deportation.

This precise argument has been recently considered, and in each instance rejected, by the Ninth and Seventh Circuits. Lourdes Cabuco-Flores v. Immigration and Naturalization Service, Nos. 72-1333 and 72-1818 (9th Cir. April 13, 1973), and Milande v. Immigration and Naturalization Service, No. 72-1529 (7th Cir. July 5, 1973).

In Cabuco-Flores, the Ninth Circuit held that a deportation order based on overstaying one's visitor's visa did not bring into play the provisions of 8 U.S.C. § 1251(f) because the deportation order "did not depend directly or indirectly upon the asserted misrepresentation in obtaining the visa."

In Milande, the Seventh Circuit "agreed" with the ruling in Cabuco-Flores and in like fashion held that the provisions of 8 U.S.C. § 1251(f) are "available only when the fraud is relevant to the charge for which deportation is sought."

Accordingly, in both Cabuco-Flores and Milande, it was held that one subject to a deportation order on the grounds that his visitor's visa had expired could not invoke the provisions of 8 U.S.C. § 1251(f) on the plea that when he obtained his visitor's visa he did so with fraud and misrepresentation in that he did not intend to leave when his visitor's visa expired and that he intended to stay permanently in the United States. We subscribe to both the reasoning and the result in Cabuco-Flores and Milande.

We are not unaware of Immigration and Naturalization Service v. Errico, 385 U.S. 214 (1966), which did not deal with an overstayed visitor's visa, but concerned two persons who had gained entry into the United States as immigrants, as opposed to visitor status, by fraud and misrepresentation. However, as was deemed to be true in both Cabuco-Flores and Milande, we believe our disposition of the present controversy to be in full accord with the reasoning of Errico. Errico suggests to us, too, that the provisions of 8 U.S.C. § 1251(f) may operate as a waiver of a deportation charge if, and only if, the deportation charge "results directly from the misrepresentation." Such is not true in the instant case.

Order affirmed.

APPENDIX B:

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A19 821 979 - Denver

In re: MONIQUE PREUX

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
James R. Barash, Esq. &
Loa E. Bliss, Esq.
Legal Services of El Paso Co.
104 South Tejon Street
Colorado Springs, Colorado 80902

ON BEHALF OF I&N SERVICE:
William E. Weinert, Esq.
Trial Attorney

CHARGES:

Order: Section 241(a)(2), Immigration and Nationality Act - remained longer nonimmigrant visitor

Lodged: None

APPLICATION: Termination of proceedings

This is an appeal from an order of a special inquiry officer finding the respondent deportable and directing her deportation to Belgium. The appeal will be dismissed.

Our review of the record and briefs on appeal satisfies us that the hearing

was fair, that deportability has been established by clear, convincing and unequivocal evidence, and that the special inquiry officer properly applied the pertinent legal principles. Section 241(f) of the Immigration and Nationality Act does not benefit respondent, since she entered as a nonimmigrant, Matter of Mangabat, Interim Decision 2131 (BIA 1972). The District Director's denial of an extension of stay is not reviewable by a special inquiry officer or this Board, Matter of Sourbis, 11 I&N Dec. 335 (BIA 1965).

ORDER: The appeal is dismissed.

Chairman

APPENDIX C:

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A19 821 979 - Denver

In the Matter of §
MONIQUE PREUX § IN DEPORTATION
Respondent § PROCEEDINGS

CHARGE: I&N Act - Section 241(a)(2), remained longer nonimmigrant visitor

APPLICATION: Termination under Section 241(f)

IN BEHALF OF RESPONDENT:
James R. Barash, Esq. &
Loa E. Bliss, Esq.
Legal Services of El Paso Co.
104 South Tejon Street
Colorado Springs, Colo. 80902

IN BEHALF OF SERVICE:
William E. Weinert, Esq.
Trial Attorney
El Paso, Texas 79984

DECISION OF THE SPECIAL INQUIRY OFFICER

The respondent is a female alien, of uncertain marital status, 22 years old, and a native and citizen of Belgium who has contested deportability. In pleading to the order to show cause herein (Exhibit 1), the respondent admitted allegations one, two, and three; she admitted allegation four "with an explanation" and without further elaboration as to the "explanation" and hence she is regarded as having denied allegation four in view of this allegation

not being unequivocally admitted; she denied allegation five; and she denied that she was deportable as charged.

The Government introduced into evidence, in support of the charge of deportability and to prove the allegations which were contested, a photo copy of pertinent portions of the respondent's passport (Exhibit 2), an application to extend time of temporary stay executed by the respondent herein which was filed with the Denver Office of the Immigration Service on December 8, 1971 (Exhibit 3), and a letter dated January 24, 1972, from the District Director at Denver to the respondent advising her that her application for extension of stay was denied (Exhibit 4). Page 14 of the respondent's passport shows that she was admitted to the United States on June 25, 1971, at the port of New York. Allegation three of the order to show cause states this fact and the respondent admitted this allegation. Page 15 of the respondent's passport contains a nonimmigrant visa issued to the respondent at the United States Embassy at Brussels on June 3, 1971, under classification "B-2" and this visa recites that it is valid indefinitely for multiple applications for admission into the United States. I take administrative notice that classification "B-2" means a nonimmigrant visitor for pleasure as defined in section 101(a)(15)(B) of the Immigration and Nationality Act. In her application for extension of time of temporary stay which the respondent executed on December 7, 1971, and submitted to the Denver Office of the Immigration Service on December 8, 1971 (Exhibit 3), she stated that her nonimmigrant classification was that of a tourist (B2), that her authorized stay expires December 24, 1971, that the date and port of her last

arrival in the United States was June 25, 1971, at New York (items 5 & 6), and that she desired an extension until June 24, 1971 (item 7). In this application she stated also that she was not married but that she had a child Amorette Teresa Ortiz, born September 5, 1970, in the United States (item 16) and she stated that she, in addition to using the name Monique Preux also used another name "Ortiz" (items 1 & 2). A lengthy statement prepared by one of the two attorneys presently representing the respondent is attached to the aforesaid application for extension of stay and there is also attached to this application a birth certificate of the child Amorette Teresa Ortiz. In his letter of January 24, 1972 addressed to the respondent (Exhibit 4), the District Director of Denver advised her that her application for extension of temporary stay was denied and stated two reasons for the denial. In addition, the respondent was informed that she would have to depart from the United States not later than February 3, 1972.

On her part, the respondent presented no evidence to controvert the evidence above submitted by the Government nor has she made any claim that she was granted an extension of stay or given any permission to remain in the United States beyond February 3, 1972. She has, however, contended that she is immune from deportability and this will be considered later below.

Section 214(a) of the Immigration and Nationality Act [8 U.S.C. 1184(a)] contains the statutory authorization for the admission to the United States of nonimmigrant aliens and for their stay in this country. That section provides for the issuance of

regulations in connection with the admission and stay in the United States by such individuals. The regulations which have been promulgated and which are pertinent to the issue here with reference to the admission and stay of this respondent in the United States as a nonimmigrant visitor for pleasure, classification "B-2," are found in 8 C.F.R. 214.1 and 214.2(b). The admission of the respondent to this country as a nonimmigrant visitor on June 25, 1971, was governed by these regulations and her further continuance in this country and request for an extension of stay are also governed by these regulations. Within the purview of these regulations the denial of the respondent's application for extension of stay by the District Director at Denver which has been referred to above was an action that is not appealable. The action of the District Director was not arbitrary and he informed the respondent of the two reasons why he denied her application for further extension of nonimmigrant visitor stay in this country as is shown by reference to his letter of January 24, 1972 (Exhibit 4). The validity of these reasons is confirmed by the respondent's own testimony in the course of the instant deportation proceeding where she stated that she wished to continue to remain in the United States (R. 10) and that when she entered the United States on June 25, 1971, she entered intending to remain in this country and she still wished to remain in this country (R. 20 & 21). Further testimony on the part of the respondent during the course of the hearing shows that she had formed a liaison with a man by the name of Maurnice Ortiz otherwise known as Jimmy Brown of Colorado Springs, Colorado, and that she has been living with this man. The child Amorette Teresa Ortiz is the issue

of their relationship. Testimony by this individual during the hearing confirmed this fact. During the course of the hearing the testimony of the respondent and Ortiz/Brown was to the effect that they have created a common-law marital relationship between them in the State of Colorado. However, reference to the application for extension of stay made by this respondent (Exhibit 3) shows that she stated therein she was not married (item 16). All of these facts show that the District Director at Denver did not act in an arbitrary fashion in denying the respondent's application for extension of stay.

I find from the evidence adduced herein that allegations four and five of the order to show cause have been established by clear, convincing, and unequivocal evidence. Allegations one, two, and three were admitted by the respondent and have also been established or corroborated by the evidence herein. I conclude, therefore, that the respondent is now deportable under section 241(a)(2) of the Immigration and Nationality Act as an alien who, after admission as a nonimmigrant under section 101(a)(15) of said Act, has remained in the United States for a longer time than permitted, as charged in the order to show cause.

Counsel for the respondent has moved for termination of the proceedings under section 241(f) of the Immigration and Nationality Act [8 U.S.C. 1251(f)] upon the ground that the respondent as the mother of a United States citizen, the child Amorette Teresa Ortiz, is entitled to relief under this section. The birth of this child in Colorado is established by the evidence herein (Exhibit 7) and the Government has conceded that the respondent is the mother of this child.

The respondent testified that she entered the United States with the intention of remaining in this country and that she still had the same intention, that she obtained the nonimmigrant visitor's visa which she used to enter this country because this was the only visa available to her at the time, that she did not request a different type of visa than the visitor's visa because she knew she would not be granted one (R. 20 & 21). Counsel for the respondent has contended, also, that the Government had instituted an earlier deportation proceeding with reference to this respondent based on the charge that the respondent at the time of entry to the United States came into this country for the purpose of resuming residence with a man with whom she had earlier resided in the United States and that hence the respondent at the time of entry was excludable as an alien who did not have a valid immigrant visa. The record of that earlier deportation proceeding, which was before myself, has been received into evidence in the instant proceeding (Exhibit 6). After the hearing based on that earlier order to show cause had been opened and adjourned by me to a later date, it had been "cancelled" by the District Director at Denver under the authority of 8 C.F.R. 242.7 on November 23, 1971, and some months later, on April 13, 1972, the instant deportation proceedings were commenced by issuance of the present order to show cause herein (Exhibit 1). The action of the District Director in cancelling the earlier order to show cause (Exhibit 6) was erroneous on his part under the regulation, 8 C.F.R. 242.7, for the reason that the hearing thereunder had been opened by me on October 27, 1971, and the proper course of procedure would have been to move that the case be dismissed for any

of the reasons shown in the regulation. The error, however, was harmless for the Immigration Service could have lodged another charge, such as the present charge of deportability stated in the current order to show cause (Exhibit 1), in a subsequent session of the hearing had the hearing been resumed at a later date as was contemplated when I adjourned it after the session held on October 27, 1971. Reference to the transcript of that session of the hearing shows that the Trial Attorney announced the Government intended to lodge another charge, albeit under section 241(a)(9) of the Immigration and Nationality Act (see p. 8 of the transcript, part of Exhibit 6). Also, in the continued hearing, if one had been held, the Government could have withdrawn and abandoned the original charge of deportability stated in the order to show cause by which the earlier deportation proceedings had been commenced (Exhibit 6).

In support of his contention that the respondent is immune from deportability under section 241(f) of the Act, counsel for the respondent has cited INS v. Errico, 385 U.S. 214 (1966) and Perkins v. Elg, 307 U.S. 325 (1939). The latter case is clearly inapposite. It is concerned only with the issue of whether or not Elg lost United States citizenship by the action of her parents and by holding that she had not lost United States citizenship it was ruled that Elg was not under the jurisdiction of the deportation statute. The matter of the applicability of the Errico decision needs to be considered, however. The principle of the Errico decision is not applicable to aliens who are deportable on a charge that they are nonimmigrants who overstayed temporary admission in the United States and hence relief from deportability under section 241(f) of the

Act will not be granted to a respondent who is being charged with deportability as an overstay visitor. Tsaconis v. INS, 397 F.2d 946 (7th Cir. 1968); Ferrante v. INS, 399 F.2d 98 (6th Cir. 1968); Contra, Vitales v. INS, 443 F.2d 343 (9th Cir. 1971). Subsequent to the decision in the Vitales case the Board of Immigration Appeals held that that decision is not binding on a nationwide basis and that the provisions of section 241(f) of the Act do not benefit an alien who entered the United States as a nonimmigrant. Matter of Mangabat, Int. Dec. 2131 (1972). Similarly, Matter of Koryzma, Int. Dec. 2033 (1970). With reference to the contention of counsel for the respondent during the hearing that the Government originally instituted a deportation hearing with reference to this respondent on a charge based that she was deportable for the reason that she was excludable at the time of entry as an immigrant without a visa (Exhibit 6), and then subsequently dropped this charge in favor of the present charge of deportability, the Government may select the charge it wishes to proceed with and an alien cannot complain that a charge was not selected which would have been more advantageous to him because he could thereby benefit from certain provisions of the statute providing for discretionary relief if the charge desired by the alien had been used. Ntovas v. Ahrens, 276 F.2d 383 (7th Cir. 1960), cert. den. 364 U.S. 826; Loos v. INS, 407 F.2d 651 (7th Cir. 1969), cert. den. 396 U.S. 877.

Although earlier in the hearing counsel for the respondent indicated that the respondent would seek relief as the spouse of a United States citizen, counsel finally elected not to proceed for such relief.

Counsel indicated toward the close of the hearing that the respondent would not seek to adjust status under section 245 of the Immigration and Nationality Act and relied only upon relief under section 241(f) of the Act. In view of this it will not be necessary to comment on the lengthy testimony which was adduced with reference to whether or not this respondent was married to Maurnice Ortiz, otherwise known as Jimmy Brown and whether that individual was a United States citizen. If Ortiz/Brown is a United States citizen and if the respondent is validly married to him, he may, if he wishes, file a visa petition with the District Director of the Immigration Service at Denver and thereby establish for the respondent immediate relative status under section 201(b) of the Immigration and Nationality Act. Such status having been established in that manner, the respondent may, if she chooses, seek to reopen the instant deportation proceedings to give her an opportunity to file an application for adjustment of status to that of resident alien under section 245 of the Immigration and Nationality Act. Up to the present time she has not elected to seek an adjustment of status thereby. She may, of course, also seek to obtain an immigrant visa once she has departed from the United States and wishes to return to this country at a later time.

The respondent has made no application for voluntary departure. She relies entirely upon the contention that she is not deportable under section 241(f) of the Act. As I have already concluded that relief under that section is not available to her she will be ordered deported to Belgium, the country that she designated.

ORDER: IT IS ORDERED that the respondent's motion for termination of the deportation proceedings pursuant to section 241(f) of the Immigration and Nationality Act is hereby denied.

IT IS FURTHER ORDERED that the respondent be deported from the United States to Belgium on the charge contained in the order to show cause.

B. S. Karmiol
Special Inquiry Officer

APPENDIX D:

8 USC 1101(a)(3), Immigration and Nationality Act of 1952 § 101(a)(3)

(a) As used in this chapter -

(3) The term "alien" means any person not a citizen or national of the United States.

8 USC 1101(a)(15)(B), Immigration and Nationality Act of 1952 § 101(a)(15)(B)

(a) As used in this chapter -

(15) The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens -

(B) an alien (other than one coming for the purpose of study or of performing skilled or unskilled labor or as a representative of foreign press, radio, film, or other foreign information media coming to engage in such vocation) having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure;

8 USC 1182(a)(19), Immigration and Nationality Act of 1952 § 212(a)(19)

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into

the United States:

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

8 USC 1182(a)(20), Immigration and Nationality Act of 1952 § 212(a)(20)

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(a) of this title;

8 USC 1201(a)(2), Immigration and Nationality Act of 1952 § 221(a)(2)

(a) Under the conditions hereinafter

prescribed and subject to the limitations prescribed in this chapter or regulations issued thereunder, a consular officer may issue

(2) to a nonimmigrant who has made proper application therefor, a nonimmigrant visa, which shall specify the classification under section 1101(a)(15) of this title of the nonimmigrant, the period during which the nonimmigrant visa shall be valid, and such additional information as may be required.

8 USC 1251(a)(1), Immigration and Nationality Act of 1952 § 241(a)(1)

(a) Any alien in the United States (including an alien crewman) shall, upon order of the Attorney General, be deported who -

(1) at the time of entry was within one or more of the classes of aliens excludable by law existing at the time of such entry.

8 USC 1251(a)(2), Immigration and Nationality Act of 1952 § 241(a)(2)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who -

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation

of this chapter or in violation of any law of the United States.

8 USC 1251(f), Immigration and Nationality Act of 1952 § 241(f)

(f) The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure or who have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

APPENDIX E:

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under
Section 242 of the
Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of)
MONIQUE PREUX)
Respondent.)

To: Monique Preux File No. A19 821 979
230 No. Wasatch Ave., Apt. 1, Colorado Springs, Colorado 80903

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Belgium and a citizen of Belgium
3. You entered the United States at New York, New York on or about June 25, 1971;
4. You were then admitted as a visitor for pleasure and were authorized to remain in the United States until December 24, 1971;
5. You had previously been admitted as a visitor for pleasure November 28, 1969, and had been authorized to remain in the United States until September 1, 1971;
6. You had between November 28, 1969, and May, 1971, resided in an illicit relationship with a man who was legally married to another woman;

7. When you last entered June 25, 1971, you entered for the purpose of resuming residence with that person in the United States;

8. You were not in possession of a valid immigrant visa.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(1) of the Immigration and Nationality Act, in that, at time of entry you were within one or more of the classes of aliens excludable by the law existing at the time of such entry, to wit, aliens, who are immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing card, or other valid entry document and note exempted from the possession thereof by said act or regulations made thereunder.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 17027 Federal Office Building, 20th and Stout Streets, Denver, Colorado 80202 on October 27, 1971 at 3:00 p.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: October 20, 1971
Issued: 2:50 p.m.
Form I-221
(Rev. 3-30-67)

IMMIGRATION AND NATURALIZATION SERVICE

/s/ Lloyd D. Prowell
Lloyd D. Prowell, Deputy
District Director
Denver, Colorado

APPENDIX F:

A-19 821 979

17027 Federal Office Building
Denver, Colorado 80202
November 23, 1971

Miss Monique Preux
230 N. Wasatch Avenue, #1
Colorado Springs, Colorado 80903

Dear Miss Preux:

The deportation proceedings lodged against you have been terminated and the Order to Show Cause has been cancelled. Enclosed find your passport and Form I-94 given to you at time of entry. Please note that your authorized period of admission expires on December 24, 1971

Very truly yours,

John L. Todd
District Director

Enclosure

cc: Loa Elaine Bliss
Suite 300
104 S. Tejon
Colorado Springs, Colorado 80902

CERTIFIED MAIL - Return Receipt Requested

APPENDIX G:

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under
Section 242 of the
Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of)
MONIQUE PREUX)
Respondent.)

To: Monique Preux File No. A19 821 979
230 No. Wasatch Ave., Apt. 1, Colorado Springs, Colorado 80903

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen of the United States;
2. You are a native of Belgium and a citizen of Belgium
3. You entered the United States at New York, New York on or about June 25, 1971;
4. You were then admitted as a visitor for pleasure and were authorized to remain in the United States until February 3, 1972;
5. You have remained in the United States beyond February 3, 1972, without authorization.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the

following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101 (a)(15) of said act you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at 17027 Federal Office Building, 20th and Stout Streets, Denver, Colorado 80202 on April 26, 1972 at 2:00 p.m., and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: April 13, 1972
Issued: 9:15 am
Form I-221
(Rev. 3-30-67)

IMMIGRATION AND NATURALIZATION SERVICE

Lloyd D. Prowell, Deputy
District Director
Denver, Colorado

APPENDIX H:

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOURDES CABUCO-FLORES, Petitioner, vs. IMMIGRATION & NATURALIZATION SERVICE, Respondent.	No. 72-1333
GENEVIEVE L. MANGABAT, Petitioner, vs. IMMIGRATION & NATURALIZATION SERVICE, Respondent.	No. 72-1818

[April 13, 1973]

On Petition to Review a Decision of the United States Immigration & Naturalization Service

Before: BROWNING, HUFSTEDLER and WALLACE, Circuit Judges

BROWNING, Circuit Judge:

These petitions for review raise a common question under section 241(f) of the Immigration and Nationality Act, 8 U.S.C. § 1251(f), an ameliorative statute providing that in some circumstances fraud or misrepresentation by an entering alien who has close family ties with a citizen or lawfully admitted permanent resident

may be waived as a ground for deportation.[1] The issue is whether section 241(f) applies to deportation of a temporary visitor on the ground that the visitor has overstayed the period authorized. We hold that it does not.

Both petitioners are aliens, citizens of the Philippine Islands. Each entered the United States as a nonimmigrant visitor for a stipulated period. After entry, each gave birth to a child, a United States citizen by birth. Deportation proceedings were commenced against each on the ground that she had remained longer than permitted by her visa, and was therefore deportable under section 241(a)(2) of the Act. 8 U.S.C. § 1251(a)(2). Each defended on the ground that she was saved from deportation by section 241(f) because when she applied for her visitor's visa she fraudulently concealed an intention to remain in the United States permanently.

The Board of Immigration Appeals rejected the defense as to petitioner Mangabat on the ground that section 241(f) applies

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[1]Section 241(f) of the Act, 8 U.S.C. § 1251(f) reads:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

only to persons who enter as immigrants and not to those who enter as nonimmigrants. The Board rejected the defense as to petitioner Cabuco-Flores on the ground that her testimony established that she intended to remain permanently only if she could do so lawfully and thus failed to establish the requisite fraud.[2]

We sustain the deportation orders on another ground, namely, that the charge of remaining after the expiration of the period permitted by each petitioner's visitor's visa was not waived by section 241(f) because it did not depend directly or indirectly upon the asserted misrepresentation in obtaining the visa.

Literally, section 241(f) waives deportation of aliens only "on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation," in violation of section 212(a)(19), 8 U.S.C. § 1182(a)(19). The Supreme Court rejected a literal reading of section 241(f) in Immigration Service v. Errico, 385 U.S. 214, 217 (1966), noting that by consistent administrative interpretation the section "waives any deportation charge that results directly from the misrepresentation regardless of the section of the statute under which the charge was brought" (emphasis added).

Thus, while not limited to the single ground for deportation found in section

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[2] See Bong Youn Choy v. Barber, 279 F.2d 642, 645-46 (9th Cir. 1960).

212(a)(19), section 241(f) is properly invoked only when the fraud is "germane to the charge" upon which deportation is sought, Muslemi v. Immigration & Naturalization Service, 408 F.2d 1196, 1198 (9th Cir. 1969) (see also Hames-Herrera v. Rosenberg, 463 F.2d 451, 454 (9th Cir. 1972); Jolley v. Immigration & Naturalization Service, 441 F.2d 1245, 1251-52, 1254 (5th Cir. 1971); Loos v. Immigration & Naturalization Service, 407 F.2d 651, 654 (7th Cir. 1969); Tsaconas v. Immigration & Naturalization Service, 397 F.2d 946 (7th Cir. 1968)),[3] and the charge relates to entry. Hames-Herrera v. Rosenberg, supra; Khadjenouri v. Immigration & Naturalization Service, 460 F.2d 461, 462 (9th Cir. 1972); Ferrante v. Immigration & Naturalization Service, 399 F.2d 98, 104 (6th Cir. 1968); Tsaconas v. Immigration & Naturalization Service, supra.[4]

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[3]"The statutory waiver excuses charges which are incidental to the misrepresentation, such as perjury, improper quota charge, entry without inspection, and lack of proper documents (when waiver can be simultaneously granted). However, the mere fact that the alien claims to have made a misrepresentation at the time of entry does not excuse him from deportation validly ordered on another charge, not related to the misrepresentation" (footnotes omitted). Gordon & Rosenfield, Immigration Law & Procedure § 4.7c, 4-41.

See also Ntovas v. Ahrens, 276 F.2d 483, 484 (7th Cir. 1960) (decided under § 7 of the 1957 Act). See note 5.

[4]See also Rutledge v. Esperdy, 200 F. Supp. 231 (S.D.N.Y. 1961), affirmed on the basis

Section 241(f) applies only to that fraud or misrepresentation which the government must prove to establish the ground relied upon for deportation; in some circumstances it excuses such fraud. It does not make the alien's fraud an affirmative defense, independently exculpatory without regard to the proof required to establish the ground for deportability relied upon by the government.

In those cases petitioners were ordered deported because the period of their authorized temporary stays had expired. The government's case was completed upon proof that petitioners were admitted as nonimmigrant visitors for a temporary period, the period had elapsed, and petitioners had not departed. The charge had nothing to do with petitioners' entry; lawfulness of their entry was assumed. Proof that petitioners' visas were procured by fraud was irrelevant to the charge. Giving full effect to the section 241(f) waiver, the government's proof of the ground relied upon for deportation was unimpaired. Accordingly, the orders of deportation are not barred by section 241(f).

This interpretation is consistent with the section's language. It is also in harmony with the section's purpose, for Congress intended no more than to grant relief to aliens "facing expulsion or deportation because they had gained entry through misrepresentation." Immigration

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of district court's opinion 297 F.2d 532 (2d Cir. 1961), decided under § 7 of the 1957 Act). See note 5.

Service v. Errico, supra, 385 U.S. at 220-21.[5] It avoids the anomalous consequence that an alien may escape deportation simply by "substitut[ing] for his own convenience a ground not involved in the deportation proceedings." Ntovas v. Ahrens, 276 F.2d 483, 484 (7th Cir. 1960). See also Tsaconas v. Immigration & Naturalization Service, supra, 397 F.2d 946, 948. It avoids the constitutional question raised by petitioner Cabuco-Flores, who points out that if section 241(f) is held to apply, but the factual determination of the Board in her case is upheld, petitioner Mangabat will be allowed to remain in this country, while petitioner Cabuco-Flores, whose situation is in all respects the same except that she did not enter with a fraudulent intent, will be deported.

This construction averts the wholesale frustration of statutory limitations on immigration foreseen by the government, which suggests that a fraudulent intent to remain cannot be detected at the time of entry, nor disproved during a deportation proceeding.

Finally, this construction limits the impact of the apparent inconsistency between section 241(f)'s automatic waiver where fraud is involved, and the severely limited conditions under which aliens having

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[5]The Court was referring to § 7 of the 1957 Act, Pub. Law 85-316, 71 Stat. 639. "The present § 241(f) is essentially a re-enactment of § 7 of the 1957 Act. The legislative history leaves no doubt that no substantive change in the section was intended." Immigration Service v. Errico, 385 U.S. 214, 223 (1966).

close family ties in the United States can be relieved of various other grounds of deportation. See section 244 of the Act, 8 U.S.C. § 1254; section 212(e), 8 U.S.C. § 1182(e); section 212(h), 8 U.S.C. § 1182(h).

The holding of Muslemi v. Immigration & Naturalization Service, supra, is not to the contrary, and, as suggested earlier, its rationale supports the result we reach here. Muslemi was not charged with overstaying; indeed, he was notified that deportation proceedings were to be instituted against him one day before his temporary visa expired. 408 F.2d at 1198. Deportation was sought on the ground that he had entered without an immigrant visa and was therefore excludable under section 212(a)(20), 8 U.S.C. § 1182(a)(20), and deportable under section 241(a)(1), 8 U.S.C. § 1251(a)(1), 408 F.2d at 1197. To prove its charge, the government was required to establish that Muslemi entered the United States as an immigrant, that is, as one who intended to remain in this country permanently. The government was required to prove that Muslemi had obtained his temporary visitor's visa by fraudulently misrepresenting his intentions. Thus, the "misrepresentation was germane to the deportation charge" (408 F.2d at 1199) -- waiver of the fraud barred proof essential to that charge.

The rule we adopt is also consistent with Lee Fook Chuey v. Immigration & Naturalization Service, 439 F.2d 244 (9th Cir. 1971). Lee Fook Chuey entered the United States under a false claim of citizenship derived from his father. He was ordered deported on the charge that he was an alien, who entered without inspection in violation

of section 241(a)(2), 8 U.S.C. § 1251(a)(2). Obviously, proof of this charge required the government to establish that petitioner's claim of citizenship was false. Section 241(f) was therefore determinative.

However, Vitales v. Immigration & Naturalization Service, 443 F.2d 343 (9th Cir. 1971), cannot be reconciled with our present holding: Section 241(f) was held to bar Vitales' deportation on the ground that she had overstayed the period permitted by a nonimmigrant visitor's visa obtained by fraudulently concealing an intention to remain in this country permanently.

The Supreme Court granted certiorari in Vitales, 404 U.S. 983 (1971). Thereafter, petitioner left the country voluntarily. The Supreme Court vacated the judgment of this court, and remanded with instructions to dismiss the petition. 405 U.S. 983 (1972). This court's decision in Vitales is therefore no longer binding precedent. See United States v. Munsingwear, Inc., 340 U.S. 36, 39-41 (1950).[6]

The orders of the Board are affirmed.

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[6]In view of the dictum to the contrary in Chung Wook Myung v. Immigration & Naturalization Service, 468 F.2d 627, 628 n.1 (9th Cir. 1972), this opinion has been circulated to all the active members of the court. No judge has requested that the case be heard in banc.

APPENDIX I:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 JANUARY SESSION, 1973

No. 72-1529)
FRANCISCO MILANDE,)
Petitioner,) Petition for Review
v.) of an Order of the
) Immigration and
IMMIGRATION AND) Naturalization Ser-
NATURALIZATION SERVICE,) vice.
Respondent.)

ARGUED FEBRUARY 20, 1973 - DECIDED JULY 5, 1973

Before SPRECHER, CIRCUIT JUDGE, GRANT*, SENIOR DISTRICT JUDGE, and GORDON**, DISTRICT JUDGE.

GORDON, DISTRICT JUDGE. The petitioner seeks review of a final deportation order of the Board of Immigration Appeals. That order was based on § 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C.

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*Senior District Judge Robart A. Grant of the Northern District of Indiana is sitting by designation.

**District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

§ 1251(a)(2), and upheld a determination by a Special Inquiry Officer that the petitioner, a nonimmigrant, had overstayed his temporary visa. This court's jurisdiction is found in § 106(a) of the Act, 8 U.S.C. § 1105a(a).

The principal issue presented is whether a non-immigrant alien facing deportation for overstay is entitled to the exemption provided by § 241(f) of the Act, 8 U.S.C. § 1251(f). We are also asked to decide whether § 241(f) is available where, as is alleged here, the true underlying basis for the deportation attempt is fraud and misrepresentation rather than overstay.

The petitioner, Francisco Milande, is a native and citizen of the Philippines. On August 14, 1969, he was issued a non-immigrant visitor's visa; on August 21, 1969, he and his wife entered the United States as visitors for pleasure, permitted to remain until November 21, 1969. Before expiration of this visa, an extension of the temporary stay was granted to May 20, 1970. No further requests for extensions were received.

On March 2, 1970, Mr. Milande filed a third preference visa petition pursuant to § 203 of the Act, 8 U.S.C. § 1153, as a first step in an attempt to adjust his presence to immigrant status. He allegedly was advised at that time that it was unnecessary to request another extension of his visitor's visa pending determination of his application. A child was born to the petitioner and his wife in South Bend, Indiana, while the application was pending.

On November 23, 1970, the petition was approved. Mr. Milande received notice

of approval by means of the Immigration and Naturalization Service's Form I-464A. He remained passive with respect to extending his temporary visa because he believed that Form I-461 would automatically be issued allowing him to remain lawfully in the United States until a new visa number became available. This form, however, was never issued.

During an investigation initiated prior to approval of the petition, the Immigration and Naturalization Service discovered evidence and obtained statements indicating that the petitioner had obtained his nonimmigrant visa by fraud. Deportation proceedings were contemplated on the basis of this information. When deportation proceedings were commenced, however, in April, 1971, they were based on overstay rather than fraud.

Mr. Milande moved to terminate the proceedings pursuant to § 241(f) and, alternatively, requested voluntary departure. On June 10, 1971, the Special Inquiry Officer found him deportable for overstay. On appeal, the Board of Immigration Appeals affirmed the finding of deportability and the denial of the motion to terminate, but it reversed that portion of the Special Inquiry Officer's order which denied voluntary departure.

The petitioner contends that the board erred in refusing to allow him the benefits of § 241(f). That section, as interpreted in Immigration and Naturalization Service v. Errico, 385 U.S. 214, 217 (1966),

> ". . . waives any deportation charge that results directly from the

> misrepresentation regardless of the section of the statute under which the charge was brought, provided that the alien was otherwise admissable at the time of entry."

The petitioners in Errico were immigrants, not temporary visitors. The respondent urges, and the board held, that § 241(f) is not available to nonimmigrants but only to immigrants.

Section 241(f) has been held applicable in a deportation proceeding against a nonimmigrant where the deportation charge involves fraud. Muslemi v. Immigration and Naturalization Service, 408 F.2d 1196 (9th Cir. 1969). The court of appeals for the ninth circuit had also held that § 241 (f) was available to a nonimmigrant charged with overstay where it was shown that the nonimmigrant visitor's visa had been obtained by fraudulent concealment of an intention to remain in this country permanently. Vitales v. Immigration and Naturalization Service, 443 F.2d 343 (9th Cir. 1971). Because the petitioner in Vitales left the country voluntarily after the Supreme Court granted certiorari, Immigration and Naturalization Service v. Vitales, 404 U.S. 983 (1971), the Supreme Court vacated the judgment and directed dismissal. Immigration and Naturalization Service v. Vitales, 405 U.S. 983 (1972).

While not technically reversing Vitales because it believed the dismissal negated Vitales' precedential status, the court of appeals reversed the position expressed therein in the recent case of Cabuco-Flores v. Immigration and Naturalization Service, ___ F.2d ___ (9th Cir., Case No. 72-1333, decided April 13, 1973).

In Cabuco-Flores, the court did not consider the immigrant-nonimmigrant distinction controlling on the question of whether § 241(f) is applicable in an overstay charge against a nonimmigrant. Instead, it sustained deportation orders, on facts very similar to the ones at bar, on the ground that

> ". . . the charge of remaining after the expiration of the period permitted by each petitioner's visitor's visa was not waived by section 241(f) because it did not depend directly or indirectly upon the asserted misrepresentation in obtaining the visa. ___ F.2d at ___.

We agree with the ruling in Cabuco-Flores. To prove overstay, the respondent need only show a nonimmigrant's admission for a temporary period, that the period has elapsed, and that the nonimmigrant has not departed. Any fraud or misrepresentation at time of entry is irrelevant to the charge of overstay; § 241(f) is available only when the fraud is relevant to the charge for which deportation is sought. Muslemi v. Immigration and Naturalization Service, 408 F.2d 1196, 1198 (9th Cir. 1969); Tsaconas v. Immigration and Naturalization Service, 397 F.2d 946, 948 (7th Cir. 1968).

A clear showing of overstay was made here. The petitioner's extended temporary visa expired on May 20, 1970. Deportation proceedings were begun on April 5, 1971, at which time the petitioner had not departed. We conclude, therefore, that the waiver provisions of § 241(f) were properly held inapplicable by the board in this case, although we do not hold, as the board appar-

ently did, that § 241(f) is never available to nonimmigrants. Whether we would agree with the court of appeals for the ninth circuit that the benefits of § 241 (f) are available when a nonimmigrant is sought to be deported for fraudulent entry rather than overstay will not be decided in the absence of a record directly presenting that situation.

Mr. Milande also argues that the true basis for the deportation proceedings challenged here is fraud uncovered during the pending of his petition for third preference. He urges that the overstay was formally relied on in an attempt to circumvent the availability of § 241(f). It is argued, therefore, that the proceedings should be treated as though based on fraud and the benefits of § 241(f) be made available.

We disagree. Contrary to his alleged expectations, Mr. Milande's temporary visa had expired by the time the government discovered the apparent fraud. We do not believe that the subsequent discovery of evidence indicating fraud precluded the government from seeking deportation for an overstay already effected. As the court stated in Cabuco-Flores:

> "Section 241(f) applies only to that fraud or misrepresentation which the government must prove to establish the ground relied upon for deportation; in some circumstances it excuses such fraud. It does not make the alien's fraud an affirmative defense, independently exculpatory without regard to the proof required to establish the ground for deportability relied upon by the government." ___ F.2d at ___ (emphasis supplied).

The petitioner also details a prior practice of the Immigration and Naturalization Service allowing nonimmigrants relatively automatic extensions of temporary visas pending determinations of their petitions. It is conceded that this practice is no longer operative. He suggests, therefore, in somewhat conclusory terms, that the position we have now taken allows the government, once it has uncovered fraud, to simply delay action on the petition until the temporary visa expires. It follows, he concludes, that the government could circumvent § 241(f) in all nonimmigrant cases by doing just that and then charging only for overstay. We recognize that there is some merit to the petitioner's argument. We also perceive the possibility of some valid counterarguments, however. Consequently we believe that consideration of this problem should be deferred until such time as it is properly before the court; the present record does not squarely present the issue.

The order of the Board of Immigration Appeals is affirmed.

A true Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit.